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IN THE
COURT OF APPEALS OF INDIANA

WALTON INVESTMENT GROUP and DEBORAH WALTON,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A04-0608-CV-432
JAMES TOLIVER,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0504-PL-012646

April 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-defendants Walton Investment Group (WIG) and Deborah Walton (collectively, appellants) appeal from the trial court's judgment in favor of appellee-plaintiff James Toliver. Specifically, appellants argue that (1) the trial court erred by entering judgment against appellants because Toliver did not give them notice of the property's defective sewer system, and (2) the evidence was insufficient to support the trial court's $3200 damages award. Finding that appellants had notice of the sewer problem and that the trial court's award for damages was proper, we affirm the judgment of the trial court.

FACTS

On January 3, 2004, the Marion County Public Health Division (PHD) filed an emergency complaint for injunction against Steven Walton, regarding rental property that he owned (the Property) in Indianapolis. The complaint alleged that because of "defects, specifically water and/or waste pipes [that] are not properly installed or maintained, the subject property presents an imminent health or safety hazard to its occupants and to the general citizenry of Marion County, Indiana." Ex. D.

Later that month, Toliver contacted Steven about renting the Property. Prior to leasing the Property, Steven told Toliver that it "had a slight sewer problem, and that it wasn't nothing major and that he would take care of it." Tr. p. 13. Toliver was unaware of the PHD's complaint regarding the Property.

On February 13, 2004, Toliver signed a lease for the Property. The lease listed WIG as the landlord and Deborah signed on behalf of WIG. At the time of signing, Toliver paid the prorated February rent and a $900 security deposit. Toliver, his girlfriend Sherry, and

Sherry's four children moved into the residence on the Property immediately.

Shortly after moving in, Toliver began experiencing problems with the Property's sewer system, causing sewer waste to back up into the showers and toilets of the home. Toliver notified Steven about the problem "two or three weeks" after moving in because "the house was having odor and [Toliver] had to clean human waste out of the tub, the shower, and everything every time" the facilities were used. Id. at 14, 18. Steven told Toliver that he didn't know anyone who could fix the problem and asked Toliver for recommendations. Toliver contacted Lucius Hayes, and Hayes inspected the problem and concluded that "the [sewer] line from the house to the street needed to be replaced." Id. at 15.

Despite Sherry and Toliver's repeated requests that Steven fix the sewer line, nothing was done. In early May 2004—approximately two months after Toliver notified Steven about the problem—Toliver, Sherry, and the children moved out of the residence. When Toliver asked Steven to refund his $900 security deposit, Steven told him that he would have to contact Deborah because she had that money.

On April 22, 2005, Toliver brought an action against Steven, Deborah, and WIG (collectively, defendants), alleging breaches of contract and the warranty of habitability and a violation of Indiana Code section 32-31-8-5, which provides that a landlord will deliver the rental residence in "a safe, clean, and habitable condition" and maintain all sanitary systems in "good and safe working condition."

On June 14, 2005, Steven filed a counterclaim against Toliver for unpaid rent. That same day, appellants filed a motion to dismiss for failure to name a real party in interest. The

trial court held a hearing on August 3, 2005, and denied appellants' motion on August 16, 2005. A bench trial commenced on April 7, 2006, and the trial court entered judgment in favor of Toliver on April 11, 2006, ordering defendants to pay $3,200 in damages and $3,655.50 in attorney's fees. Appellants now appeal.[1]

DISCUSSION AND DECISION

I. Judgment Against Appellants

Appellants do not deny that WIG was the Property's landlord or that Deborah signed Toliver's lease on behalf of WIG. Instead, appellants argue that Toliver never gave them notice of the Property's sewer problem and, instead, only notified Steven. Therefore, appellants argue that they are not liable pursuant to Indiana Code section 32-31-8-6(b), which provides that "[a] tenant may not bring an action under this chapter unless . . . [t]he tenant gives the landlord notice of the landlord's noncompliance with a provision of this chapter."

While it is clear that Toliver dealt almost exclusively with Steven regarding the sewer problem, the following exchange occurred at trial during Deborah's[2] cross-examination of Toliver:

> Q. At the time you signed the lease – on this lease, it states that there was going to be rent received the first of March and there was a security deposit of $900 which you gave me. Did you take the time to read the lease when we gave you the lease?
> A. I read some of the lease.
> Q. But you didn't read the whole lease?
> A. No.
> Q. Okay. Do you remember me asking you if Steven informed you about the

[1] Steven is not a party on appeal.

[2] Deborah represented herself pro se at trial.

bathroom prior to you signing the lease, concerning the sewer problem?

A. No. He didn't tell me exactly what the problem was.

Q. That's not my question. My question is, do you remember me asking you if Steven informed you about the sewer problem prior to you signing the lease?

A. Yes, he told me about the sewer problem.

Tr. p. 26-27 (emphases added). While the motivation for Deborah's line of questioning was to get Toliver to admit that he knew about the sewer problem before he signed the lease, her questions confirm that appellants also knew about the sewer problem on that date.

Deborah's questioning also reveals that appellants held Steven out as their agent when Toliver signed the lease. "[A]n agent 'is a substitute or deputy appointed by the principal with power to do certain things which the principal may or can do.'" Fioretti v. Aztar Indiana Gaming Co., LLC, 790 N.E.2d 587, 591 (Ind. Ct. App. 2003) (quoting 3 Am.Jur.2d Agency § 1 (1964)). "Apparent authority" refers to a third party's reasonable belief that the principal has authorized the acts of its agent, and apparent authority arises from the principal's indirect or direct manifestations to a third party and not from the representations or acts of the agent. Gallant Ins. Co. v. Isaac, 751 N.E.2d 672, 675 (Ind. 2001).

Based on Deborah's representations to Toliver, Toliver reasonably believed that Steven had apparent authority to act on behalf of appellants with regard to the Property's sewer problem.[3] Therefore, the notice that Toliver gave Steven regarding the unrelenting sewer problem was sufficient to notify appellants because Steven was their agent acting with

[3] Steven may have also had actual authority to act on behalf of appellants; however, the exact relationship between defendants is unclear based on the record. Therefore, we decline to find that actual authority existed. Gallant Ins. Co. v. Isaac, 751 N.E.2d 672, 675 (Ind. 2001) (holding that actual authority is created

apparent authority. Therefore, we cannot find that the trial court erred when it entered judgment against appellants.

II. Damages[4]

Appellants raise two issues regarding the trial court's damages award, arguing that (1) there was insufficient evidence to support the trial court's $3200 award for damages, and (2) the trial court erred by including Toliver's $900 security deposit in the award because Toliver did not provide appellants with a forwarding address, thereby failing to comply with Indiana Code section 32-31-3-12.[5]

We use a limited standard of review in cases challenging a trial court's award of damages. Whitaker v. Brunner, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004). Recognizing that the trial court is in a better position than we are to observe the witnesses, we will not judge witness credibility or otherwise reweigh the evidence. Id. We will consider only that evidence favorable to the trial court's award. Id. However, "[t]he damage award cannot be based on speculation, conjecture, or surmise, and must be supported by probative evidence." Id. The trial court's award of damages will be reversed only if it is not within the scope of the evidence. Id.

"by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account") (emphasis added).

[4] Appellants do not argue that the Property's sewer problem was not a breach pursuant to Indiana Code section 32-31-8-5 and concede that "judgment in favor of the plaintiff [Toliver] is supported by the evidence presented at trial." Appellants' Br. p. 11. Instead, appellants only argue that the trial court's award for damages was improper.

[5] Indiana Code section 32-31-3-12 provides, "Upon termination of a rental agreement, a landlord shall return to the tenant the security deposit . . . . The landlord is not liable under this chapter until the tenant supplies

Indiana Code section 32-31-8-6 provides that a tenant who succeeds in an action brought under that section—as is the case here—may recover "actual and consequential damages," "attorney's fees and court costs," and "any other remedy appropriate under the circumstances." That section also provides that a landlord's liability for damages begins when "the landlord has notice or actual knowledge of noncompliance." I.C. § 32-31-8-6(e).

To review the trial court's damages award, we must determine when appellants' liability began to run. Here, the PHD's emergency complaint—which alleged that because of "defects, specifically water and/or waste pipes [that] are not properly installed or maintained, the subject property presents an imminent health or safety hazard to its occupants and to the general citizenry of Marion County, Indiana[,]" ex. D—suggests that the Property was uninhabitable shortly before Toliver signed the lease. Appellants do not assert that they were unaware of the PHD's action or that they did anything to remedy the Property's sewer problem before Toliver took possession.[6] In light of these circumstances, we find that appellants' delivery of the Property to Toliver violated section 32-31-8-5, which requires that rental premises be delivered "in a safe, clean, and habitable condition." Therefore, appellants' liability began to run when Toliver signed the lease and took possession of the uninhabitable Property on February 13, 2004.

Because appellants' liability began to run when Toliver signed the lease, it was proper

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the landlord in writing with a mailing address to which to deliver the notice and amount prescribed by this subsection."

[6] As noted above, Deborah's cross-examination of Toliver at trial proves that she knew about the Property's sewer problem when Toliver signed the lease. Tr. p. 26-27.

for the trial court to award Toliver the entire value of the rent that he had paid while living on the Property. Evidence was presented at trial that Toliver paid approximately $2300 in rent before vacating the Property. Tr. p. 13, 15, 16.

Turning to the $900 security deposit, the damages statute states that a trial court can award a tenant "any other remedy appropriate under the circumstances." I.C. § 32-31-8-6(d). Appellants argue that the trial court erred by including the security deposit in the damages award because Toliver did not provide them with an address where the deposit could be sent, as required by Indiana Code section 32-31-3-12. This argument is unpersuasive. A tenant typically utilizes section 32-31-3-12 when a landlord first sues the tenant for damages and the tenant counterclaims for the return of the security deposit. See, e.g., Lae v. Householder, 789 N.E.2d 481, 482 (Ind. 2003); Deckard Realty & Dev. v. Lykins, 688 N.E.2d 1319, 1321 (Ind. Ct. App. 1997). Such is not the case here. Indiana Code section 32-31-8-6 authorizes a trial court to award a tenant an appropriate remedy, and we cannot conclude that the trial court erred by including Toliver's $900 security deposit in its award for damages. Therefore, we find that the trial court's $3200 award for damages was proper.[7]

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.

[7] Appellants do not argue that the trial court erred in its award or calculation of Toliver's attorney's fees.